No. 92-___

92-1465

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

92-1465

Supreme Court, U.S.
FILED
SEP 14 1993
OFFICE OF THE CLERK

ORIGINAL

PAUL CASPARI and JEREMIAH NIXON,

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO FILE IN FORMA PAUPERIS

Respondent Terry McIntyre, by and through his appointed attorney Dorothy D. Danforth, asks leave to file the attached Response to Petition for Writ of Certiorari, without prepayment of costs and to proceed *in forma pauperis.* Respondent has been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. No affidavit is attached, inasmuch as the U.S. Court of Appeals for the Eighth Circuit appointed counsel for respondent under the Criminal Justice Act of 1964.

Respectfully submitted,

Dorothy D. Danforth

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(314) 721-6677
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

Dorothy D. Danforth hereby certifies that she has caused a true copy of the Respondent's Motion for Leave to File in Forma Pauperis to be served upon the Attorney General for the State of Missouri, Post Office Box 899, 221 W. High Street, Jefferson City, Missouri, 65102, via first class mail.

Dated September 14, 1993.

Dorothy D. Danforth

DOROTHY D. DANFORTH

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Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Respondent

QUESTIONS PRESENTED

I.

WHETHER THE QUESTIONS PRESENTED BY THE PETITIONERS ARE NON-JUSTICIABLE ISSUES BECAUSE THEY ADDRESS MATTERS PERTINENT ONLY TO GRADY V. CORBIN WHICH HAS BEEN OVERRULED BY THIS COURT.

II.

WHETHER REGARDLESS OF THE FACT THAT GRADY V. CORBIN HAS BEEN OVERRULED, RESPONDENT STILL PREVAILS ON HIS CLAIM OF DOUBLE JEOPARDY.

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Respondent Terry McIntyre respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

On November 22, 1985 respondent Terry McIntyre took into his possession an automobile which was owned by a car dealership in St. Louis County, Missouri. Two days later, on November 24, 1985, respondent was arrested in the county of St. Louis City which is adjacent to St. Louis County. In June of 1986 in St. Louis City respondent was prosecuted, tried and found guilty of the offense of Tampering in the First Degree[1]. Respondent was sentenced on July 11, 1986 as a prior and persistent offender to serve a term of ten years.

On August 9, 1986 respondent was charged in St. Louis County with having committed the offense of Stealing[2]. Respondent's motion to dismiss the stealing charge on double jeopardy grounds was denied and in February of 1987 respondent was found guilty and was sentenced to a term of ten years to run consecutively to the sentence imposed on him previously for tampering.

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[1] Section 569.080, RSMo 1986 Tampering in the first degree provides that: 1. A person commits the crime of tampering in the first degree if: (2) He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile... without the consent of the owner thereof.

[2] Section 570.030, RSMo 1986 Stealing-penalties states: 1. A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

Respondent's conviction was affirmed by the Missouri Court of Appeals, State v. McIntyre, 7459 S.W.2d 111 (Mo. Ct. App. 1988). Respondent filed a petition for writ of habeas corpus on September 2, 1988 in the United States District Court for the Eastern District of Missouri. The District Court denied McIntyre's petition for writ of habeas corpus on October 17, 1989. The United States Court of Appeals for the Eighth Circuit granted the writ of habeas corpus on July 15, 1991. Rehearing was denied on September 4, 1991. The State of Missouri filed a Petition for Writ of Certiorari and respondent filed his response. This Court remanded the case to the Eighth Circuit for reconsideration in light of United States v. Felix, _____U.S.__, 112 S.Ct. 1377 (1992). On reconsideration, the Eighth Circuit affirmed its previous decision. The State of Missouri again Petitions this Court for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The issues raised by the petitioners in their questions presented deal only with the retroactive application of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) and with the manner of interpreting Grady in connection with the federal rules of evidence. These questions are inappropriately before this Court as Grady v. Corbin has been overruled. For the reason that Grady has been overruled, the petition for a writ of certiorari should be denied.

Although Grady v. Corbin has been overruled respondent's claim of double jeopardy continues to prevail. Under the same-

elements test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 respondent's subsequent prosecution for stealing violates the double jeopardy clause. Because the same double jeopardy issue has been addressed on numerous occasions by this Court, even as recently as June of 1993 in United States v. Dixon, _____U.S.__, 113 S.Ct. 2849 (1993), and because the issues are virtually identical to those addressed by this Court in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) this case is not worthy of a grant of certiorari.

I.

Whether the questions presented by the petitioners are non-justiciable issues because they address matters pertinent only to Grady v. Corbin which has been overruled by this Court.

The petitioners' first question presented inquires whether the rule of Grady v. Corbin, 495 U.S. 508 (1990), can be applied retroactively to a habeas corpus petitioner because the Double Jeopardy Clause's bar to a successive prosecution is a categorical guarantee of the Constitution. This Court need not consider this question presented by the petitioner because it is moot as a matter of law.

This Court has recently overruled Grady v. Corbin in United States v. Dixon, _U.S.__, 113 S.Ct. 2849 (1993) and the question raised by the petitioners concerning the retroactive application of Grady is therefore an inappropriate subject for this Court to consider.

In their first point, the petitioners focus solely on the retroactivity of Grady v. Corbin and the bulk of the petitioners' argument concerns the reading of the first exception to the retroactivity rule set forth in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and the question of whether Grady v. Corbin created "new law". Petitioners argue that a division among the Circuits regarding this issue makes the issue worthy of this Court's consideration. The issue is a non-issue and is not worthy of this Court's grant of certiorari. There can be no dispute between the Circuits concerning the manner in which an overruled case is to be read.

The petitioners second question presented asks whether the double jeopardy clause, as interpreted in Grady v. Corbin, 495 U.S 508 (1990), (1) prohibits the introduction at trial of "evidence of other crime" where that crime has already been prosecuted or (2) prohibits the prosecution of a crime where evidence of that crime was adduced at an earlier trial as "evidence of other crime." Because of the fact that Grady v. Corbin was overruled by United States v. Dixon, this question presented is also a moot issue and as such in nonjusticiable.

The State's second argument addresses the evidentiary questions which were raised in United States v. Felix, ___ U.S. __, 112 S.Ct. 1377 (1992) and which were the first indication by this Court that Grady v. Corbin posed unforeseen problems in prosecutions. Inasmuch as the State's argument addresses only the question concerning the issues of "evidence of other crimes" and Rule 404(b)

of the Federal Rules of Evidence in the context of a Grady v. Corbin analysis it is moot. This Court should not grant a writ of certiorari to a Petitioner whose questions presented have become nonjusticiable since the time the Petition was filed with this Court.

No supplemental brief has been filed by the State thus far addressing the fact that Grady v. Corbin has been overruled by the recently decided case United States v. Dixon, _ U.S._, 113 S.Ct. 2849. The petitioners have not suggested that Grady should be overruled nor have they suggested that the case is an incorrect interpretation of the application of the double jeopardy clause, rather, the arguments raised by the petitioners concern narrow issues of retroactivity and the rules of evidence as applied in Grady. Rule 14.1(a) of the Rules of the Supreme Court of the United States provides that: "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." The questions set forth in the petition do not warrant review by this Court on the basis of the fact that they are moot and the Court need not address any questions not raised by the Petitioners.

II.

Whether regardless of the fact that Grady v. Corbin has been overruled, respondent still prevails on his claim of double jeopardy.

Certiorari should not be granted in this case because, regardless of the fact that Grady v. Corbin was overruled, there is no impact on the determination of the Eighth Circuit that respondent McIntyre's

stealing conviction violated his Fifth Amendment right which guarantees that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause was incorporated to apply to the states through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Respondent prevails on his double jeopardy claim under the newly decided United States v. Dixon which restores the double jeopardy analysis to its pre-Grady state. Respondent prevails under the "same-elements" test which was established in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) and which has been reiterated in numerous decisions of this Court. As summarized in Dixon, 113 S.Ct. at 2856 "[t]he same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977) provides respondent with the analysis of the double jeopardy clause which most clearly elucidates the double jeopardy question which arose in respondent's case. In Brown the criminal defendant was prosecuted first for joyriding[3] under the laws of the state of Ohio and after his conviction was later prosecuted for stealing[4] the same vehicle. This

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[3] The Ohio statute prohibiting joyriding provided that: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner."

[4] The Ohio stealing statute provided: "No person shall steal any motor vehicle"

Court held that the subsequent prosecution for stealing violated the double jeopardy clause of the Fifth Amendment. The opinion stated that the offenses were the same for purposes of the double jeopardy clause in that all of the elements of one of the offenses, the joyriding offense, would be required to be proved in order for the defendant to be convicted of stealing. The Blockburger test was employed in reaching this conclusion.

The Brown v. Ohio decision focused on the fact that joyriding had been determined to be a lesser included offense of stealing by the Ohio Court of Appeals. Because joyriding was deemed a lesser included offense of stealing it would necessarily be subsumed by the offense of stealing. This Court further held that "the sequence [in which the two cases are prosecuted] is immaterial" Brown 97 S.Ct at 2227 and in response to the Ohio Court of Appeals determination that because two different days were involved that there was no double jeopardy this Court stated, "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id

Under the Missouri tampering in the first degree statute no proof beyond that required for conviction of stealing is required. Each element required in tampering in the first degree must be proven in order for a defendant to be convicted of stealing. The elements in tampering in the first degree are: that a person knowingly possess an automobile without the consent of the owner. The elements in stealing are: that a person appropriate property of

another with the intent to deprive him thereof without his consent. The word "appropriate" is defined in section 570.010(3) RSMo to mean "to take, obtain use, transfer, conceal or retain possession of." Stealing requires all of the elements required in tampering in the first degree with the additional element of the intent to deprive and to prosecute a defendant under both statutes is to violate the double jeopardy clause.

Citing a number of previously decided cases, the Missouri Court of Appeals determined that McIntyre could be prosecuted for stealing after his tampering conviction because tampering is not a lesser included offense of auto theft. The cases cited by the Missouri Court of Appeals considered whether the crime of tampering in the second degree was a lesser included offense of auto theft. Those decisions analyzed the elements of the two crimes (tampering in the second degree and stealing) and found that each offense required proof of an element that the other did not. The Missouri Court of Appeals in State v. McIntyre, 749 S.W.2d 420 (Mo.App., E.D. 1988) failed to mention the fact that McIntyre was prosecuted for tampering in the first degree not tampering in the second degree. The elements of tampering in the first degree do not include an element that is not also an element of stealing.

The Missouri Court of Appeals was under the mistaken impression that defendant McIntyre had been charged with and found guilty of tampering in the second degree. Had he been charged with tampering in the second degree respondent concedes that he would not have a viable double jeopardy claim under the

Blockburger test nor could he successfully argue, under Missouri case law, that the crime for which he was first convicted was a lesser included offense for the crime for which he was subsequently prosecuted. However, because respondent was prosecuted under the tampering in the first degree statute rather than the tampering in the second degree statute his subsequent prosecution for stealing violated the double jeopardy clause.

This Court included the following dicta in a footnote in Brown v. Ohio "We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent. (Citations omitted). We also would have a different case if in sustaining Brown's second conviction the Ohio courts had construed the joyriding statute to have that effect. We then would have to decide whether the state court's construction, applied retroactively in this case, was such 'an unforeseeable judicial enlargement of a criminal statute' as to violate due process." 97 S.Ct. at 2227, fn. 8.

While Respondent is fully aware of the fact that this Court will typically not review a state court's interpretation of state law, Garner v. Louisiana, 368 U.S. 157, 169, 82 S.Ct. 248, 254, 7 L.Ed.2d 207 (1961), it is apparent that in addition to the fact that the Missouri Court of Appeals may have decided McIntyre incorrectly, it also applied its decision that tampering in the first degree was not a lesser included offense of stealing retroactively to defendant McIntyre and in so doing violated the due process clause of the Fourteenth Amendment. The Missouri Courts had not previously

held that tampering in the first degree was not a lesser included offense of stealing and the decision was made applicable to defendant McIntyre retroactively. This is precisely the situation addressed by this Court in Brown v. Ohio in footnote eight.

This Court may review a state court's decision as a matter of determining whether the fundamental guarantee of due process provided to criminal defendants and made applicable to the states under the Fourteenth Amendment was denied. In Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) this Court stated that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." Id., 378 U.S. at 352, 84 S.Ct. at 1702. Later in the opinion this Court stated, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. (citing Hall, General Principles of Criminal Law (2d ed. 1960) at 61)." Bouie, 378 U.S. at 354, 84 S.Ct. at 1703. Finally, this Court found that,

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. (Citations omitted). The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive

> the defendant of the fair warning to which the Constitution entitles him... When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' (Citing Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107). Bouie v. City of Columbia, 378 U.S. at 354, 84 S.Ct. at 1703.

The questions presented to this Court by the petitioners are not appropriate issues to be heard by this Court and for that reason no writ of certiorari is warranted. Furthermore, respondent prevails on his double jeopardy claim regardless of the status of Grady v. Corbin as the two offenses for which respondent was prosecuted are in fact one offense under the Blockburger test. This case is not worthy of review by the United States Supreme Court; in fact, if any review is necessary the appropriate arena would be that of the Eighth Circuit.

CONCLUSION

For all of the foregoing reasons, respondent Terry D. McIntyre respectfully requests this Court to deny a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Dorothy D. Danforth hereby certifies that she has caused a true copy of the Response to Petition for Writ of Certiorari to be served upon the Attorney General for the State of Missouri, Post Office Box 899, 221 W. High Street, Jefferson City, Missouri, 65102, via first class mail.

Dated September 14, 1993.

Dorothy D. Danforth

DOROTHY D. DANFORTH